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No. 79-748

In the Supreme Court of the United States

OCTOBER TERM, 1979

MARVIN J. GOLDMAN AND FRED BURKA, ETC., PETITIONER

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

WADE H. McCREE, JR.
Solicitor General

JAMES W. MOORMAN
Assistant Attorney General

ROBERT L. KLARQUIST
NANCY B. FIRESTONE
Attorneys
Department of Justice
Washington, D.C. 20530

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OPINIONS BELOW

The order of the court of appeals (Pet. App. 41a) is reported at 599 F. 2d 1050. The opinion of the court of appeals (Pet. App. 40a-41a) is not reported. The opinion of the district court (Pet. App. 1a-39a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on June 29, 1979. By orders of September 11 and October 24, 1979, the Chief Justice extended the time for filing the petition to November 10, 1979, and the petition was filed on November 9, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the district court was required to consider whether a less than fee simple interest in petitioners' land would have sufficed to achieve respondent's public purpose.

STATEMENT

In 1973, respondent Washington Metropolitan Area Transit Authority (WMATA) informed petitioners of its intention to acquire an interest in property that petitioners owned in Bethesda, Maryland, for construction of a subway station. In 1975, WMATA informed petitioners that it needed a 699 sq. ft. permanent surface easement, an 8,722 sq. ft. permanent subsurface easement, and a 25,318 sq. ft. construction easement (J.A. 68-69).[1] WMATA also informed petitioners that no compensation would be paid for the partial taking because the value of the remainder after the construction of the subway would exceed the current value of the entire tract.

On March 16, 1977, WMATA presented petitioners with a "Statement of Just Compensation," stating that WMATA had decided to acquire fee title to the entire property and offering petitioners $858,600 as just compensation (J.A. 73). Petitioners responded with a counter-offer of $409.000 for acquisition of the partial easements and the construction easement (J.A. 74-81). When negotiations between the parties failed to produce agreement, WMATA initiated this condemnation action in the United States District Court for the District of Maryland to condemn a fee simple title to the entire parcel. Petitioners answered that WMATA had exceeded its statutory authority and had acted arbitrarily, capriciously, and in bad faith by seeking to acquire full fee title (J.A. 18-25, 45-46).

Following a bench trial, the district court granted WMATA's motion to strike and for summary judgment and denied petitioners' motion to vacate or, in the

[1] "J.A." refers to the joint appendix in the court of appeals.

alternative, to stay the declaration of taking (Pet. App. 39a). The court held that, because at least a portion of the property was admittedly required for the construction and operation of the subway system, the taking was for a public purpose, and that WMATA's decision to take a full fee estate was not arbitrary, capricious, or in bad faith (Pet. App. 28a-38a). Thereafter, the court entered judgment fixing just compensation at $1,058.600, as the parties had stipulated (J.A. 260). The court of appeals affirmed per curiam (Pet. App. 40a-41a).

ARGUMENT

The decision below is correct. It does not conflict with any decision of this Court or any court of appeals, and petitioners present no issue warranting review by this Court.

Petitioners' contention before this Court is that WMATA sought a fee simple interest in the land, not because it needed such an interest to carry out its concededly public purpose, but because it wanted a "bargaining weapon in order to obtain the necessary easements without paying just compensation therefor * * *" (Pet. 16-17). In petitioners' view, this alleged tactic was "arbitrary, capricious and in bad faith * * *" (Pet. 11). Contrary to petitioners' contention (Pet. 11), however, the district court did not refuse to consider this defense; it explicitly ruled that "allegations of bad faith conduct or arbitrary and capricious action on the part of the condemning authority are * * * always allowable * * *" (Pet. App. 26a), and it considered petitioners' allegations in detail (Pet. App. 26a-38a). What the district court did hold was that, because construction of the subway station was concededly in furtherance of a public purpose (Pet. App. 33a), and because WMATA did in fact need some portion of petitioners' land to carry out that purpose (Pet. App. 32a), the court could not enter judgment for petitioners unless it "determine[d]

that in fact WMATA does not need the entire take of the land to accomplish its stated purpose and that a mere partial take of the land would suffice" (Pet. App. 36a). The court concluded that "[t]his is not a justiciable question and the court is precluded from any such inquiry" (*ibid.*).

The district court's conclusion was compelled by *Berman* v. *Parker*, 348 U.S. 26 (1954), in which the Court held that "[o]nce the question of the public purpose has been decided, the amount and character of land to be taken for the project and the need for a particular tract to complete the integrated plan rests in the discretion of the legislative branch" (*id.* at 35-36). The question in *Berman* was whether a particular tract of land could properly be condemned as part of a sweeping urban renewal project; the question here is whether petitioners' entire parcel can be condemned in the face of petitioners' allegations that a lesser portion, or a lesser interest, would suffice. In both cases the answer is the same: "[i]f the [a]gency considers it necessary in carrying out the * * * project to take full title to the real property involved, it may do so. It is not for the courts to determine whether it is necessary for successful consummation of the project that * * * title to the land be included, any more than it is the function of the courts to sort and choose among the various parcels selected for condemnation." *Berman* v. *Parker*, *supra*, 348 U.S. at 36.

Petitioners attempt to distinguish *Berman* v. *Parker* by casting their dispute with WMATA as one involving the question whether "the taking is not for the public use asserted by the condemning authority, but rather some other purpose which was not authorized by the statute and [is] forbidden by the Constitution" (Pet. 15). But since petitioners agree that the construction of a subway system, and the condemnation of land for that purpose,

is a legitimate exercise of congressional power (Pet. 13), and since they also agree that their land could appropriately have been chosen for a subway station (Pet. 14), it is apparent that their claim of "some other purpose" is simply a claim that WMATA has sought a fee simple interest when some lesser interest, such as various easements, would have sufficed. As the district court properly concluded, this claim invites the court to rule that the public agency must be restricted, in condemning land for a valid public purpose, to limits the court deems appropriate. This is the inquiry that *Berman* v. *Parker* prohibits. Once the court determines, as it did here, that the land is being taken for a public use, "the judicial function is exhausted, and the extent, amount, or title of property to be taken lies within administrative determination, subject only to the requirement that just compensation be paid." *Ledford* v. *Corps of Engineers of United States*, 500 F. 2d 26, 28 (6th Cir. 1974). See *Berman* v. *Parker*, *supra*, 348 U.S. at 36.

Petitioners' contention (Pet. 12-15) that further review in this case is justified because they have challenged WMATA's economic motives in taking a fee estate is without merit. Courts have consistently refused to "second guess" the government's asserted purpose for condemnation. *United States* v. *80.5 Acres, of Lands, Etc., Co. of Shasta, Cal.*, 448 F. 2d 980, 984 (9th Cir. 1971). In addition, the validity of a taking is not defeated because the decision to condemn an entire tract is based in part on economic factors. WMATA admittedly needs all of the property for at least two years while subway construction is taking place, and admittedly needs at least some permanent easements for operating the subway after the station is completed (Pet. 11; J.A. 139). That WMATA considered relative costs in deciding to

condemn the entire fee does not invalidate the taking.[2] *United States ex rel. T.V.A.* v. *Welch*, 327 U.S. 546, 554 (1946); *United States* v. *6,321 Acres, of Land, Etc., Suffolk Co.*, 479 F. 2d 404, 407 (1st Cir. 1973); *United States* v. *Agee*, 322 F. 2d 139, 142-143 (6th Cir. 1963); *Southern Pacific Land Co.* v. *United States*, 367 F. 2d 161, 163 (9th Cir. 1966), cert. denied, 386 U.S. 1030 (1967); *United States* v. *State of South Dakota*, 212 F. 2d 14, 15 (8th Cir. 1954); see generally 2A *Nichols on Eminent Domain* §7.223[2] (3d ed. 1976). As this Court explained in *United States ex rel T.V.A.* v. *Welch*, *supra*, 327 U.S. at 554:

> The cost of public projects is a relevant element in all of them, and the Government, just as anyone else, is not required to proceed oblivious to elements of cost.

Finally, WMATA did not abuse the process of the court in seeking to condemn in fee (Pet. 17-18). Prior to initiation of this action, WMATA negotiated with petitioners for acquisition of the partial interests or in the alternative for the entire fee. In fact, discussions on acquisition of the property continued for more than three months after WMATA announced its decision to condemn in fee. After these talks broke down, WMATA exercised its condemnation authority, and petitioners were awarded the full market value of their property.

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[2]There are also reasons beyond initial cost for WMATA's decision to condemn a fee. First, by controlling the fee, WMATA is assured that development of the parcel is made consistent with WMATA's interests. For example, by controlling the air rights, WMATA can control the timing of the development, thereby eliminating the possibility of liability in the event delays in construction of the subway occur. Further, by owning in fee, WMATA is protected from further financial liability in the event more property is needed. Occasionally, when underground easements are involved, the acquiring agency must later condemn the surface estate because the established surface uses come in conflict with the subsurface use.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

JAMES W. MOORMAN
Assistant Attorney General

ROBERT L. KLARQUIST
NANCY B. FIRESTONE
Attorneys

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